Supreme Court of the United States

OCTOBER TERM, 1947

No. 94

MEMPHIS NATURAL GAS COMPANY, PETITIONER,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI, RESPONDENT

BRIEF ON BEHALF OF THE RESPONDENT

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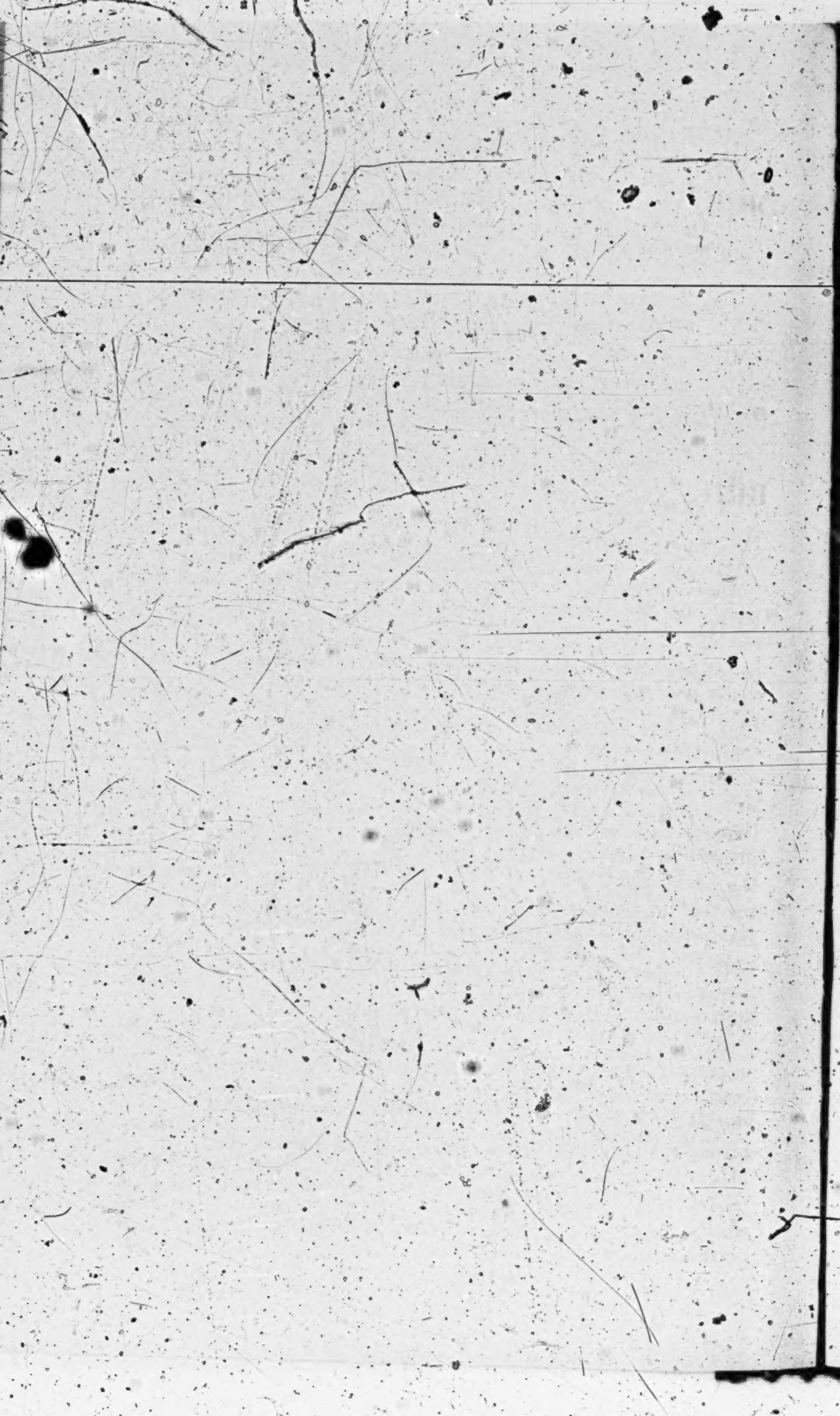
A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI, RESPONDENT

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BRIEF ON BEHALF OF THE RESPONDENT

STATEMENT OF THE CASE

This case comes from the Supreme Court of Mississippi by certiorari, granted by this Court on June 16, 1947. A petition for certiorari was filed on May 17, 1947, based upon a final judgment rendered against petitioner herein by the Supreme Court of Mississippi, rendered on the 24th day of February, 1947, same appearing as Fol. 32 on pages 19, 20, 21 and 22 of the printed record, reported in 29 So. Rep. 2D, 269.

All of the proceedings out of which this controversy grew were disclosed by the printed record beginning on page 1 thereof and continuing through and including page 11 of the printed record. Included in said record of the proceedings is the order of the State Tax Commission adjudicating liability for the tax in question, same appearing on pages 4 and 5 of the printed record. And immediately following said order, there appears a petition of the petitioner to the Mississippi State Tax Commission, and the hearing on said petition resulted in the order of the Commission previously referred to.

On pages 1 to 4, both inclusive, appears the pleading filed in the Circuit Court of Hinds County, Mississippi, filed by the petitioner in the nature of an appeal from the final order of the State Tax Commission. But since under the proceeding provided by statute, no reply of any kind was required to be filed by the Commissioner, the statute requiring that the record of the proceedings before the Tax Commision should constitute the record upon which the case should be heard in the Circuit Court, and therefore, no further pleading ap-

pears in the record other than the stipulation appearing on pages 13 and 14 of the printed record.

ARGUMENT

Section 9314 of the Code of Mississippi for 1942 provides as follows:

> "For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

Section 9312 of the Code of Mississippi for 1942 defines "doing bsuienss" as follows:

> "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

The contention relied upon by the petitioner herein, before the Tax Commission, the Circuit Court of Hinds County, and the Supreme Court of Mississippi was that because the appellant being a foreign corporation and engaged exclusively in interstate commerce, over which the State has no control, that unless the appellant saw fit to obtain permission to do an intrastate business that there was no authority of the Legislature of Mississippi to impose or demand any tribute

for the protection it afforded to the valuable property owned in Mississippi in a corporate capacity, regardless of the activity defined by the statute which would constitute "doing business" in contemplation of the law by which the tax was imposed.

In answer to this contention on the part of the petitioner, I desire to review for the benefit of this Court the history and basis of the legislation by which the tax is imposed by the law under consideration:

Section 199 of the Constitution of Mississippi defines the term "corporation" as follows:

> "The term 'corporation' used in this article shall include all associations and all joint stock companies for pecuniary gain having privileges not possessed by individuals or partnerships."

Franchise taxes are generally accepted as applying only to some form of organization which distinguishes it from an individual citizen. And in most text books, it is defined as one of the several forms of taxation to which corporations may be subjected.

In Cooley on Taxation, Fourth Edition, which is one of the oldest and highly regarded authorities on the general subject of taxation, in Section 826 of Volume 2, under the general heading "Taxation of Corporations" the following definition of Franchise Tax appears:

> "What are Franchise Taxes. The term 'franchise tax,' as generally used, has no definite legal meaning. It may mean either an excise or property tax. Generally, however, the term is used as meaning an excise, as distinguished from a property tax, imposed on franchises and consisting of a more or less arbitrary sum having little or no connection with the actual value, although such a tax, even when an excise, is often measured, at least to some extent, by the amount of property or earnings of the corporation."

Franchises are likewise divided into two classes, said classification being set out in the same work as Section 827 of said Volume, as follows:

> "Kinds of franchises. Franchises are of three kinds as follows: 1. The franchise 'to be,' which is the grant

of corporate life from the state. The right to exist as a corporation is a franchise. This is often designated as the 'corporate' franchise, and is sometimes referred to as the 'creative' franchise. The corporate franchise, i. e., the franchise to be a corporation, is the privilege that individuals possess to act as one, with legal individuality and immortality, and with divisible share capital."

In the same Section the two divisions of franchise are distinguished, the one being the right "to be," and the next distinction is the one defining the franchise as she right "to do." And it is generally recognized by all of the authorities, that a sovereign state can regard its domestic corporations as possessing a franchise or right merely to exist as such, and a sovereign state likewise has a corresponding right to impose a tax for the right or privilege "to do" upon any organization which owes its existence to the authority of some other state.

There are literally hundreds of cases in the books in which the various statutes of the several states have been construed as applied to the term "doing business." The cases are about equally divided in holding that some activities of foreign corporations are "doing business" in contemplation of the statute involved, and there are perhaps an equal number of cases in which it has been held that foreign corporations were not "doing business" in states in contemplation of the statutes of the state, being construed.

It is a positive fact that in all cases where the Courts have held that the activities of foreign corporations did not constitute "doing business," it was by reason of the fact that the statute being construed was not susceptible of a construction which would impose a tax on the activity of such foreign corporations within said state.

Reviewing all of the cases on this subject where it is manifest that it depends upon the wording of the statute as to whether or not the activities under consideration were held to be sufficient to bring the foreign corporation within the terms of the statute, there was an implication that the states could adopt their own definition of what constituted "doing business" in contemplation of the statute imposing a franchise tax on a foreign corporation .

It would appear therefore that unless the legislature in

enacting a statute had exercised the privilege of defining the term "doing business" that the conventional definition laid down by the Courts in the absence of a statutory definition, to be "the pursuit to a considerable extent of the purpose for which the corporation was organized."

The original Franchise Tax Law of Mississippi, being Article 3 of Chapter 100 of the Code of 1930, Chapter 89, Mississippi Laws 1930, did not define the term "doing business." And as a consequence the Courts construed the original Mississippi Franchise Tax Law as imposing a tax only on foreign corporations which engaged in activities within the State of Mississippi which were in pursuit of the principal purpose for which the corporation was organized.

In the early case of Home Insurance Company vs. New York State, reported 134 United States, 594, the Supreme Court of the United States held that a state in granting the right or privilege to be a corporation to its own creature, or granting a right or privilege to a foreign corporation to engage in any corporate activity within the state, could impose any condition as its legislature might judge most benefitting to its interest and policy, and require as a condition to the grant of the right "to be" to a domestic corporation, or the right "to do" to a foreign corporation, on any terms that it might see fit to adopt. And that such condition imposed either upon its own creature, or a foreign corporation was wholly within the discretion of the legislature of such state and was not a subject of inquiry by the Courts "however arbitrary or capricious." Such matters resting solely within the legislative discretion.

Fortified with the knowledge of the fact that it had the right to define the term "doing business" as contemplated by any statute it might enact by which tribute was demanded of a foreign corporation which might seek protection of the laws and government of Mississippi by coming into the state and investing its capital in tangible property located within the state, the legislature of Mississippi enacted Chapter 121 of the Laws of 1934, and defined the term "doing business" as contemplated by said act in the following language:

> "When the term 'doing business' is used in this act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident

to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

By Section 2 of said Act a tax was imposed upon all domestic corporations which might be created under the laws of Mississippi, for the mere privilege of existing as a corporation within the state, the language of said Section being as follows:

> "There is hereby imposed, to be paid and collected as hereinafter provided, a franchise or excise tax upon every corporation, association, or joint stock company for pecuniary gain, having privileges not possessed by individuals, and having capital stock represented by shares, now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to $1.00 for each $1,000.00, or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the State of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence." (This section was amended by Chapter 115, Laws of 1940, by increasing the rate of taxation to $1.50 per thousand).

In order that foreign corporations which might come into the state and enjoy the benefit and protection of the laws of the state in the ownership of property acquired and owned in the state, which ownership and use might be enjoyed under the protection of the laws and government of the state, and in order to treat the foreign corporation in exactly the same manner as the domestic corporation provided by Section 3 of said act, as follows:

> "For the year 1934 and annually thereafter, there shall be and is hereby, imposed, levied and assessed upon every corporation, association, or joint stock company, as hereinbefore defined, organized and existing under and by

virtue of the laws of some other state, territory, or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.00 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state." (This section was amended by Chapter 115, Laws of 1940, by increasing the rate of taxation to $1.50 per thousand).

The legislature then provided by Section 6 of the Act (Section 9317 of the Code of 1942), the basis for computing the tax, in the following language:

"The tax imposed, levied and assessed, under the provisions of this act, shall be calculated on the basis of the value of the capital employed in this state for the year preceding the date of filing the return, whether a calendar year, or fiscal year, except where otherwise provided in this act, measured by the combined issued and outstanding capital stock, surplus and undivided profits."

Then follows detailed instructions for determining the value of capital, surplus, and undivided profits as contemplated by the provision quoted. But in order to insure a basis for requiring something from an organization not employing its capital in the state in a manner that would justify the imposition of a tax computed according to its capital, an alternative basis for computing the tax is provided by the following language of the same section:

"But in no case shall the franchise tax so computed be less than ten dollars for the period covering which the return is filed. In no case shall the determined capital in Mississippi be less than the assessed value of the real estate and tangible personal property in Mississippi for the year covering which the return is due."

These provisions apply alike to both domestic and foreign corporations. But in order to emphasize the fact that tribute shall be exacted from foreign corporations for the mere right

to enjoy the privilege of ownership of tangible property within the state in a corporate capacity, under "the benefit and protection of the government and laws of the state," provided in Section 8 of the law, (Section 9319 of the Code of 1942), an alternative method for determining the amount of tax due, when the several elements of which a comparison is to be made, are lacking, providing as follows:

> "Provided, however, that the amount of determined capital in Mississippi shall in no case be less than the assessed value of the property of the organization in Mississippi for the year covering which return is made."

It is manifest that the legislature in the enactment of the statute under consideration, intended to impose a tax for revenue purposes upon the mere privilege of exercising any of its corporate powers in Mississippi, by foreign corporations. And this is true, even though the only corporate power exercised or enjoyed in the State was the ownership of tangible property in a corporate capacity.

It was contended by attorneys for the petitioner in the lower Court, and will no doubt be contended in this Court, that when the state exacted and collected ad valorem taxes on the assessed value of the tangible property owned within the state, that the state exhausted its authority to impose other taxes computed on the basis of the value of such property.

This contention is positively answered in the negative by the rule announced and subscribed to by the Court in the case of Louisiana ex rel, vs. Hunt, 182 La. 1073, 162 So. 777, 103 A. L. R. 9, in the annotation to which in 103 A. L. R. at page 21, the rule is stated in the following language:

> "Nor does the fact that an occupaiton tax is levied upon an ad valorem basis render it any the less an occupation tax. This method is quite frequently adopted, and in some cases might be the most just and reasonable measure for such a tax. Both kinds of taxes may be levied upon the same property, and both be levied upon an ad valorem basis, and both be valid."

As further authority in answer to the contention of the petitioner that because ad valorem taxes are imposed by the State on its tangible property situated in Mississippi, that the

state would have no right to impose an additional tax, which might be computed on the basis of the value of the property, I call the Court's attention to the provisions of Section 232 of Volume 1, Cooley on Taxation, Fourth Edition, which reads as follows:

> "It is a settled rule that it is not double taxation to impose an ad valorem tax on property used in a business and also to impose a license tax on the business or the use of the property. This rule applies equally well to taxation of corporations. Both a license or franchise tax and a tax on the property may be imposed."

Cited in support of this text are many cases from the Supreme Court of the United States,—Alabama, Florida, Kentucky, Louisiana, Massachusetts, Missouri, New Mexico, Vermont, Virginia, and the State of Washington.

In Section 243 of the same Volume of Cooley on Taxation, appears this additional language:

> "As already noted, there is no obnoxious double taxation because of the imposition of both a property and a license or occupation tax; and the same is true as to a tax on the property of a corporation and a franchise tax, where the franchise tax is not a property tax or in lieu of a property tax."

Cited in support of the last quoted text are numerous cases from the Supreme Court of the United States, — California, Kentucky, Maryland, Massachusetts, Nebraska, New York, North Carolina and Pennsylvania. And it will thus be seen that the Courts of practically all States in the Union, as well as the Supreme Court of the United States have subscribed to this rule in every instance where the question has been presented.

In answer to the anticipated contention of the attorneys for the petitioner that so long as his corporation elected to do only an interstate business, that the State of Mississippi had no right to impose a franchise tax on its acts in a corporate capacity, I call the attention of the Court to the early case of Bank of California v. City and County of San Francisco ,decided by the Supreme Court of California February 18, 1904, and reported in 75 Pac. Reporter, at page 832.

The question presented to the Court in said case which is

analogous to the question presented by the petitioner was whether or not the right to do a banking business which belonged to all citizens, could be regarded as a privilege granted by the sovereign in which the business was sought to be conducted. The Court in deciding this question used the following language:

> "While the right to do a banking business is not a franchise and belongs to all citizens generally, yet the right to carry on such business through the agency of a corporation is a franchise dependent on a grant of corporate powers by the State."

This language of the Court is directly applicable to the question raised by the petitioner. The petitioner's contention being that the right to do an interstate business was a right over which a sovereign State would have no control. And hence, so long as the petitioner elected to do only an interstate business, that the State could not grant any right or privilege which would justify the imposition of a tax, even though the interstate business was conducted by use of tangible property situated in the State.

This Court has had occasion to construe the law under consideration with reference to the exact question presented by this case, this identical law as applied to another corporation engaged in exactly the same kind of business in the same way in the State has been construed by the Federal Courts, including the District Court, the Circuit Court of Appeals and the Supreme Court of the United States. In the case of Stone v. Interstate Natural Gas Company, reported 103 Fed. 2nd., 549, the Circuit Court of Appeals of the Fifth Circuit had before it a proper construction of the identical law, the litigation involving the validity and application of this identical law to the operations of the Interstate Natural Gas Company in Mississippi, which company was engaged in the identical kind of business in the same manner as the petitioners in this case.

The Interstate Natural Gas Company, the appellee in said case, had successfully resisted the efforts of the Mississippi authorities to collect taxes on its interstate business. And had procured, through a three-judge Federal Court, an injunction, which was affirmed and made permanent by the Supreme Court of the United States.

The decision of the Court was no doubt correct in the light

of the statute which was construed in said case. The statute seeking to impose a franchise tax on a foreign corporation merely contained language defining the activity taxed under said law as "a franchise tax upon every corporation doing business in the State of Mississippi, not herein specifically exempted."

In the absence of any explanatory language indicating the privilege sought to be taxed, the Courts applied the conventional definition "the pursuit to a considerable extent within the State of the principal purpose for which the corporation was formed." And since said company admittedly did only an interstate business, the Courts held that the tax could not be imposed on such activity, under a statute which did not contain any definition nor explanation of the character of activity that the State might select as a basis for imposition of the tax.

In an effort to enact a statute under the terms of which revenue might be derived from the Interstate Natural Gas Company, and other foreign corporations similarly situated, the Legislature in 1934 enacted Chapter 121, Laws of 1934, the same being the Franchise Tax Law now in force in Mississippi.

In the preparation of the bill which was finally enacted, the framer of the bill after exhaustive study of the question, determined that the right of the State to impose the tax upon foreign corporations might be based solely on the protection that the government and laws of the State afforded, the foreign corporations owning property in the State, and relying upon the announcement of the Supreme Court of the United States in the early case of Home Insurance Company v. New York State, 134 U. S. 594, found that said Court in said case, announced the following rule:

> "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the dis-

cretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a federal tribunal. As was said in Delaware Railroad Tax Case, 18 Wall. 206, 231: 'The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' It is true, as said by this Court in California v. Pacific Railroad Co., 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created

by the amount exacted, the remedy must be sought by appeal to the legislature of the State; it cannot be furnished by the federal tribunals."

Fortified by the language of said decision, and particularly that portion which stated in effect that a State may impose such conditions as it saw fit upon a foreign corporation which came into the State with its property, and that the method and basis of taxation was not a subject of inquiry by the Courts no matter how arbitrary or capricious, provided by Section 1 of said Chapter 121, Laws of 1934, the definition of what constituted doing business in the State, which would be used as a basis for imposing a tax upon foreign corporations, said definition being as follows:

"When the term 'doing business' is used in this act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

In full explanation of the fact that this tax would be imposed upon the mere privilege of owning property in Mississippi in a corporate capacity, even though no other activity of the foreign corporations within the State could be classed as doing business, in Section 3 of said Chapter 121, Laws of 1934, the Section by which taxes were imposed on foreign corporations, explained the purpose and the basis of said tax in the following language:

"It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

The act in question having been drawn for the express purpose and being designed through the definition of doing business, and the explanation of the basis for imposing the tax, to overcome the objection to the original law under which the Interstate Natural Gas Company had succeeded in establishing its immunity from any taxes imposed by the State,

or any of its corporate activities, a test was immediately made of the new law by a demand made upon the Interstate Natural Gas Company for a franchise tax alleged to be due under the new law because of its specific provisions with reference to the basis of imposition of the tax. The Interstate Natural Gas Company, desiring to be cooperative in the matter, paid the tax demanded but filed suit for recovery thereof in the District Court of the United States. And the District Court awarded judgment to the plaintiff and allowed recovery of the taxes paid, whereupon the case was appealed to the Circuit Court of Appeals of the Fifth Circuit, where the case was tried, resulting in reversal of the judgment of the United States District Court and holding that said Company was liable for the tax, and therefore not entitled to recovery of same.

In the reported case in 103 Federal 2nd, Judge Sibley of the Circuit Court of Appeals wrote a very comprehensive and lengthy opinion, in which he discussed at length several questions raised as to the validity of the statute, and its application to the said Interstate Natural Gas Company, whose status insofar as the conduct of its business was concerned was identical with its status at the time when it had procured injunctions restraining collections of the several taxes hereinbefore mentioned.

The former injunction and decision of the three-judge Court was invoked in support of the suit by the Gas Company, but Judge Sibley, in his opinion, differentiated the two cases, pointing out the difference in the provisions of the two statutes involved, and holding that the former decision and injunction could not be depended upon for establishing immunity from the tax. He then entered into a lengthy discussion of the new statute and the language of said opinion is quoted here at length as applied to the new statute and a proper construction thereof:

> "We come thus to interpret the Act of 1934 and to determine whether it may be applied to this Gas Company. The Supreme Court of Mississippi has not construed it or its predecessor of 1930; so we must make our own construction. Chapter 89 of the Acts of 1930 (Code of Mississippi of 1930, Chapt. 4199), which the

present Act repealed, levied a 'franchise tax upon every corporation doing business in the State of Mississippi, not herein specifically exempted. Such tax shall be a tax for the continuance of enjoyment of all rights granted corporation under the corporate form of existence, if incorporated under the laws of this state, or by reason of any act of domestication, if incorporated under the laws of another state.' **'Doing business 'was not defined, and probably meant that a corporation was not subject to the tax unless or until it carrried on an active business of the k'rd named in its charter.** So also a foreign corporation might be supposed not subject if it merely qualified to 'do business' by filing copy of its charter with the Secretary of State under Chap. 4164 and appointed an agent for service under Chap. 4140, but did not become 'doesticated' under Chaps. 4161 and 4162. The Act of 1934 does not confine itself to corporations. But (Sect. 1) extends to associations, joint stock companies and 'every form of organization for pecuniary gain, having capital stock represented by shares, ... having privileges not possessed by individuals or partnerships.' . . . . 'Doing business' . . . shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization.' There is imposed (Sect. 2) an annual 'franchise tax or excise tax' upon each such organization existing in this State or hereafter organized under its laws. The same tax (Sect. 3) is then imposed on every such organization organized and existing by virtue of the laws of some other State or country 'now, or hereafter doing business within this state, as **hereinbefore defined.**' As to each class of organizations the tax is $1 per thousand dollars of 'capital used, invested or employed . . . . within this state,' and it is explained that the tax is required in the case of domestic organizations 'for the right granted by the laws of this state to exist as such organization, and enjoy under the protection of the laws . . . the powers, rights, privileges,' etc., Section 2, and in the case of foreign organizations for 'the benefit and protection of the government and

laws of the state received by the capital which measures the tax. Section 3. Payment of the tax is made a condition precedent to the continued existence of domestic organizations and 'to the right to continue business in this state if not organized under the laws of Mississippi.' Section 4. 'Continue business' we construe to mean 'continue to do business' in the new sense. There is a formula for measuring the tax to be paid which may not always be the assessed value of the property owned in the State, but the latter is the measure in the present case.

We think the tax is laid on a domestic organization because of its mere existence capitalized and ready to carry on its corporate activities. It need not do anything to incur it. The capital which is to measure the tax need not be actively employed, for the words are 'used, invested or employed;' and the declaration is that the tax is payment for the mere right to exist and enjoy protection. In order to treat the foreign organization in as nearly the same manner as possible, the tax is applied to it so soon as it 'does business' in the State. Under the common and natural meaning of these words a commercial activity would be understood, but the Legislature assigns a very artificial meaning to them, which includes not only any and every corporate act, but the exercise or enjoyment in the State of any power or privilege acquired by virtue of being so organized. The privilege and power of a corporation to sue and be sued, **or even to acquire and hold property as such,** are included. When this Gas Company, though it did not domesticate, filed its charter and appointed its agent for service in order to qualify for doing business in the old sense, it began the enjoyment in Mississippi of a privilege incident to its corporate organization, it began to 'do business' in the new and artificial sense. It already had, we suppose, when the Act was passed its pipe and telephone lines, and so did not acquire them in Mississippi during the tax years, but it must have employed and used agents to maintain them. Without putting any gas through the pipes this corporate

activity would go on. By the Legislature's queer definition, a foreign corporation formed for profit is doing business in Mississippi and is taxable so soon as it gets ready to be active by having property there and enjoying the protection of the State for it . . . . Thus both foreign and domestic corporations, though intending to do and actually doing no active business in the common sense except what is foreign or interstate commerce, are taxed, but are not taxed because they carry on such commerce. . . . This franchise or privilege tax is not escaped because the Gas Company chose only to transport and sell gas interstate. It owes no more tax because it did that. Therefore that activity is not taxed.

"The tax is laid equally on a domestic and foreign business corporation, and laid alike on either whether it carries on interstate commerce or not. There is no discrimination against foreign corporations or against interstate commerce. The tax is not on its face burdensome or oppressive, and is not shown to be so in its operation. It is evidently a tax for revenue and not designed to regulate either corporations or commerce. Therefore Stone contends that it is enforceable notwithstanding the Gas Company has in fact done no business in Mississippi except interstate commerce; pointing especially to Detroit International Bridge Co. v. Corp. Tax Board, 287 U. S. 295, 53 S. Ct. 137, 77 L. Ed. 314; Southern Natural Gas Corp. v. State, 301 U. S. 148, 57, S. Ct. 696, 81 L. Ed. 970; Id., 233 Ala. 81, 170 So. 178; Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. Ed. 1043. The Gas Company, contending the contrary, points with equal confidence to Ozark Pipe Line Corp. v. Moiner, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439; State Tax Commission v. Interstate Natural Gas Co., 284 U. S. 41, 52 S. Ct. 62, 76 L. Ed. 156; Anglo-Chilean Nitrate Corp. v. Alabama, 288 U. S. 218, 53 S. Ct. 373, 77 L. Ed. 710; Dixie Ohio Express Co. v. State Revenue Com., 306, U. S. 72, 59 S. Ct. 435, 83 L. Ed. ....., and a score of other cases holding that interstate commerce is immune from various sorts of State taxation. It would be tedious to analyze the cases and impossible fully to reconcile them. The principle of stare

decisis in constitutional interpretations has recently received shattering blows in the Supreme Court, and especially in the field or immunities from general taxation. The increasing social burdens assumed by our governments, both State and National, will require increasing and more searching taxation for their support. Any immunity from equal general taxation appears more and more inconvenient and unjust. The recent re-examination of the basis for such immuniities has resulted in an upheaval. The current of authority has been turned. For the judicial navigator the cases are no longer the beacons marking out a fixed if tortuous channel. He must for awhile fix his eyes anew upon the Constitution as the pole star of his firmament and steer his course rather by principle than by precedent . . . .

"Impairment of the commerce power of Congress really arises only if the State by intention or in actual effect regulates commerce by license or other special taxation, or burdens it unduly so as to impede it; or if the State law imposing the tax conflicts with some regulation made by the Congress in its supreme right. The immunity of interstate commerce from State taxation could have been rested not on an implication from the Commerce Clause. U. S. C. A. Const. Art. 1, Chap. 8, Cl. 3, because of possible injury to commerce and on refinded distinctions as to the incidence and measure of the tax, but on the express provision that 'No State shall without the consent of Congress lay any imposts or duties on imports or exports'." (Emphasis suplied).

This case was appealed to the Supreme Court of the United States by certiorari, petition being filed June 5, 1939, and certiorari granted, 307 United States, 620.

On December 11, 1939, by a percuriam opinion rendered this case was affirmed without opinion, the only reference being see Southern Gas Corporation v. Alabama, 301 United States, 148. The judgment of affirmance being reported in 308 United States, 522. In order to illustrate the meaning of the court by its reference to the Southern Gas Corporation case. I quote herewith the following language from said case, as indicating the adoption of the opinion of the Circuit Court

of Appeals by the Supreme Court, which is indicated by the following language taken from the Southern Gas Corporation case, to-wit:

> "In the instant case the Supreme Court of the State has reviewed its rulings and has expounded the meaning of the statute. The state court holds that the tax is a franchise tax laid 'upon the right to do business.' It is a tax levied on 'foreign corporations as a prerogative to the **Right of exercise of its corporate functions in the State.**' It 'is not on any basis a tax on business' **but is laid 'on the exercise of corporate functions within the State and its employment of its capital in Alabama.** (Emphasis suplied).

Merely for the purpose of showing that the principle announced in the early case of Home Insurance Company of New York v. State of New York, 134 U. S. 594, has continued in force up to the present date, I quote from the case of Spector Motor Service, Inc. v. Walsh, Tax Commisioner, decided by the Circuit Court of Appeals of the Second Circuit on December 24, 1943, and reported in 139 Federal 2nd, 809 in which the Home Insurance Company case, supra, was quoted with approval in the following language:

> "This is in line with the consistent view of the Court in construing a tax of this kind to be one upon the privilege of **'doing business in a corporate capacity,'** and not upon the business or activities that were the outcome of the privilege. Home Ins. Co. of New York v. State of New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025; Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B 1312; People of State of Michigan v. Michigan Trust Co. 286 U. S. 334, 52 L. Ed. 1136. This concept is, of course reinforced by the action of the legislature in 1937 in expressly making the tax one upon not merely the carrying on of business in the state, but also upon 'the right to carry on' such business." (Emphasis supplied).

The case from which this last quotation was taken was removed to the Supreme Court of the United States by certiorari, 322 U. S. 720, the decision of this Court on said case being reported in 323 U. S. at page 101. And upon submis-

sion of the case to this Court after discussing the various questions raised and decided in the lower Courts, this Court used the following language in which it emphasized the rule that the construction of a state statute by the highest Court of such state would be controlling upon this Court. The language of this Court being as follows:

> "We would not be called upon to decide any of these questions of constitutionality, with their varying degrees of difficulty, if, as the Distrct Court held, the statute does not at all apply to one, like petitioner, not authorized to do intrastate business. Nor do they emerge unitl all other local Connecticut issues are decided against the petitioner. But even if the statute hits aspects of an exclusively interstate business, **it is for Connecticut to decide from what aspect of interstate business she seeks an exaction.** It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below.
>
> "Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give one. Only the Supreme Court of Errors of Connecticut can give such an answer. But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. That the answers are not obvious is evidenced by the different conclusions as to the scope of the statute reached by the two lower courts. The Connecticut Supreme Court may disagree with the District Court and agree with the Circuit Court of Appeals as to the applicability of the statute. But this is an assumption and at best "a forecast rather than a determination." Railroad Commission v. Pullman Co., 312 U. S. 496, 499. Equally are we without power to pass definitively on the other claims urged under Articles I and II of the Connecticut Constitution. If any should prevail, our constitutional issues would either fall or, in

any event, may be formulated in an authoritative way very different from any speculative construction of how the Connecticut courts would view this law and its application. Watson v. Buck, 313 U. S. 387, 401-402.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Railroad Commission v. Pullman Co., supra; Chicago v. Fieldcrest Dairies, 316 U. S. 168; In re Central R. Co. of New Jersey, 136 F. 2d 633. See also Burford v. Sun Oil Co. 319 U. S. 315; Meredith v. Winter Haven, 320 U. S. 228,235; Green v. Phillips Petroleum Co., 119 F. 2d 466; Findley v. Odland, 127 F. 2d 948; United States v. 150.29 Acres of Land, 135 F. 2d. 878. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication." (Emphasis supplied).

The case was then remanded to the lower Court to be retained until a proceeding could be brought in which the construction of the state court could be had.

All the foregoing was presented to the Supreme Court of Mississippi when this case was pending before that tribunal. And this contention, based on the cases heretofore discussed, was the basis for the finding of the Supreme Court of Mississippi as indicated by its language as same appears on pages 20 and 21 of the printed record:

"The franchise tax here sought to be collected by the State is not a tax upon 'doing business' as that term is ordinarily understood in the purely commercial sense, but is that which is defined in the statute Secs. 9312 and 9314, as follows: 'When the term doing business is used in this Act, it shall mean and include each and every

act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust.

"It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful (fol. 34) activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.

"This statutory definition was first approved in the connection here involved as within the power of the State in Stone v. International Gas Co., 103 Fed (2nd) 544, affirmed 308 U. S. 522. Subsequently, in a connection equally pertinent in principle, it was approved and sustained by this Court in Stone v. General Contract Purchase Corp., 193 Miss. 301, 312, and in Stone v. General Electric Contracts Corp., 193 Miss. 317 it being further held in the latter case that when the incidental local activities come within the definition, it would be immaterial that the foreign corporation had no local agents, and has no office, and is not qualified to do any intrastate business in this State.

"It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it has no substantial effect to block or impede the free flow of such commerce."

As authority for the contention that the construction of the State statute involved in this case by the highest Court of the State of Mississippi is controlling on this Court, I call

this Court's attention to the language used by Mr. Justice Frankfurter in the case of General Trading Company v. State Tax Commission of Iowa, reported in 322 U. S. at page 335.

The question before the Court in said last mentioned case was very similar to the question involved in the case now before this Court. It involved the construction of a state statute which imposed an obligation on a non-resident of the State of Iowa to collect and pay a Use Tax imposed by the law of Iowa on a mercantile company domiciled in Minnesota, said operation, and the assumption of the authority of the State of Iowa being based solely on the fact that Minnesota Trading Company sent its salesmen into the State of Iowa to solicit orders for merchandise. The Supreme Court of Iowa construed said law as a valid imposition on the non-resident company, solely because the provisions of the statute attempted to make such imposition.

And although the foreign corporation was not domesticated in the State of Iowa, had no agent nor office there, the Supreme Court of Iowa held that the obligation could be imposed on the foreign corporation on such activity as the law provided should constitute a basis for the imposition. And under that state of facts, this Court used the following language, which is applicable here:

> "A judgment in favor of the Tax Commission by one of the lower courts was affirmed by the Supreme Court of Iowa, 233 Iowa 877; 10 N. W. 2d. 659. The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here. From these it appears that General Trading Company had never qualified to do business as a foreign corporation in Iowa nor does it maintain there any office, branch or warehouse. The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post. Upon these facts and its holding that Trading Company was a 'retailer maintaining a place of business in this state' within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers

in the imposition of this use tax on Iowa purchasers, and that collection could validly be made through the Trading Company." (Emphasis supplied).

Again, for the purpose of showing that the right of the State to grant a Charter to its own corporations, or permit a foreign corporation to come into the State is not limited, as announced in the early case of Home Insurance Company of New York, supra, I quote from the case of Southern Pacific Company v. McColgan, Franchise Tax Commissioner, decided by the District Court of Appeals of the First District of California, February 16, 1945, reported in 156 Pacific 2d, page 81, the following:

"A franchise tax as to foreign corporations is for the privilege of doing business within the State. It is reasonable to measure that tax by net income from business done within the State or from property within the State, that is, by the fruits of the privilege. It is true that income from business done within the state may include income from interstate business to the extent that it is done within the state, as well as income from purely intrastate business. Matson Nav. Co. v. State Board, 297 U. S. 441, 56 S. Ct. 553, 80 L. Ed. 791, in the Supreme Court of California, 3 Cal. 2nd. 1, 43 P. 2nd 805; State of Wisconsin v. Minnesota Min. Co., 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165; United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; International Shoe Co. v. Shartel, 279 U. S. 429, 49 S. Ct. 380, 73 L. Ed. 781. This is so although the right to do interstate business within the state does not depend on privilege from the state, which can neither grant nor deny that right. Crutcher v. Commonwealth of Kentucky, 141 U. S. 47, 57, 11 S. Ct. 851, 35 L. Ed. 649; see note, 105 A. L. R. 11-17, citing cases. But although a foreign corporation does not owe its right to do interstate business to the state, it has the benefit and protection of the law and government of the state in the conduct of that business. There is a reasonable relation, therefore, between the measure of the tax and the rights and benefits enjoyed by the corporation, which is lacking when

the state attempts to include income from business or property without the state. Traynor, National Bank Taxation in California, 17 Cal. L. Rev. 232, 249-257."

It is therefore manifest that under the broad authority conferred upon the States to provide upon what basis a foreign corporation would be permitted to exercise any corporate function within the State, and the State of Mississippi having made mere ownership of tangible property within the State, a sufficient exercise of corporate function to subject a foreign corporation to the imposition of a franchise tax; and the fact that the Circuit Court of Appeals of the Fifth Circuit in the Interstate Natural Gas case has so construed the Mississippi statute, and the Supreme Court of the United States has affirmed said decision, then there can be no doubt that the mere ownership of tangible property in Mississippi by this petitioner will subject such corporation to a franchise tax computed on the basis of the assessed value of the tangible property owned in Mississippi.

For the purpose of demonstrating to the Court the uniformity and continuity of the decisions following the earlier cases on the same subject, especially with reference to the right of a state to impose a franchise tax upon a domestic corporation, or upon a foreign corporation for the privilege of doing business in a corporate capacity, I call the Court's attention to the recent case of West Publishing Company v. McColgan, Franchise Tax Commissioner, decided by the Supreme Court of California on February 27, 1946, and suggestion of error overruled on March 28, 1946.

The Court was construing a statute of California which provided "There shall be levied, collected and paid for each taxable year, a tax at the rate of 4 per cent upon the net income of every corporation derived from sources within the State on and after January 1, 1937." Said statute further providing "Income from sources within this State includes income from tangible or intangible property, located or having a situs in this State, and income from any activities carried on in the State, regardless of whether carried on in intrastate, interstate or foreign commerce."

The Legislature of California had exercised the broad authority permitted to a State as set out in the case of Home Insurance Company v. New York State, hereinbefore dis-

cussed. By electing from among the many methods granted to a State for fixing the basis on which a franchise tax would be computed, as the net income of every corporation derived from sources within the State. The taxpayer however challenged the validity of the law on the ground that its entire business conducted in the State of California was interstate business, and therefore any law which sought to impose a tax computed on the amount of such income was unconstitutional.

The taxpayer in said case also contended that since under the income tax law of the State of Minnesota in which the company was incorporated and had its place of business, required income tax to be paid on its entire income wherever derived, and that therefore an attempt to impose a tax based on any part of its income was double taxation.

On the first question as to whether or not a State could use income of a corporation as a subject or measure of the tax was answered by the Court in the following language:

> "The use of income as the measure rather than the subject of the tax in the Bank and Corporation Franchise Tax Act is in conformity with a method of taxing national banks authorized by section 5219 of the United States Revised Statutes, 12 U. S. C. A. S. 548, that permits the inclusion of income in the measure of the tax that could not be made the subject of the tax. Pacific Co., Ltd. v. Johnson, 212 Cal. 148, 298 P. 489; Id. 285 U. S. 480, 52 S. Ct. 424, 76 L. Ed. 893; Educational Film Corp. v. Ward, 282 U. S. 379, 51 S. Ct. 170, 75 L. Ed. 400, 71 A. L. R. 1226; Flint v. Stone Tracy Co. 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. The use of income as the subject of the tax in the corporation Income Tax Act is in conformity with the decisions of the United States Supreme Court, cited above, that a state may tax net income from interstate commerce even though it cannot tax the privilege of engaging in interstate commerce."

As to the second proposition of double taxation that such tax based on income would be double taxation, the Court used the following language:

> "Nor is there any merit to the contention that the act discriminates against interstate commerce on the

ground that it subjects part of plaintiff's income to double taxation, given the taxability of plaintiff's entire net income in the state of its domicile. Taxation in one State is not an immunization against taxation in other states. State Tax Comm. v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A. L. R. 1436; Curry v. McCanless, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A. L. R. 162; Graves v. Elliott, 307 U. S. 383, 59 S. Ct. 913, 83 L. Ed. 1356; Guaranty Trust Co. v. Virginia, 305 U. S. 19, 59 S. Ct. 1, 83 L. Ed. 16. Taxation by states in which a corporation carries on business activities is justified by the advantages that attend the pursuit of such activities. State of Wisconsin v. J. C. Penny Co., 311 U. S. 435, 446 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229. 'Income may be taxed both by the state where it is earned and by the State of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state.' State Tax Comm v. Aldrich, supra, at page 178 of 316 U. S., at page 1010 of 62 S. Ct. 86 L. Ed. 1358, 139 A. L. R. 1436; Curry v. McCanless, supra, at page 367 of 307 U. S., at page 900 of 59 S. Ct., 83 L. Ed. 1339. 123 A. L. R. 162."

Another contention made by the present petitioner that there is no basis for imposing a franchise tax because it is not qualified to do business in the State, is answered by this further language of the Court in this recent case in the following language:

"Plaintiff contends that it has no income from sources in California within the meaning of the act on the ground that income derived from activities in furtherance of a purely interstate business does not have a source within this state. This conclusion is contrary to the express provision of the act that 'income from sources within this state includes . . . income from any activities carried on in intrastate, interstate or foreign commerce.' All the cases cited by plaintiff (Department of Treasury v. International Harvester Co., 221 Ind. 416, 47 N. E. 2d 150, 152; Commissioner of Internal Revenue v. Piedras Negras Broadcasting Co., 5 Cir., 127 F. 2d 260; Compania General de Tobacos v. Collector of Internal Revenue, 279 U. S. 306, 49 S. Ct. 304, 73 L. Ed. 704; Commissioner of

Internal Revenue 279 U. S. 306, 49 S. Ct. 304, 73 L. Ed. 74; Commissioner of Internal Revenue v. East Coast Oil Co., S. A., 5 Cir., 85 F. 2d 322, involved statutory construction rather than constitutional power, and none of them involved a statute like the act in question which expressly defines income from sources within the state as including income from any activities carried on in the state.

"Plaintiff contends that the tax violates the due process clause of the Fourteenth Amendment of the Constitution of the United States on the grounds that the state is without jurisdiction of the person, property, or business of the plaintiff, and that it gives plaintiff no protection, opportunities, or benefits that would justify a tax. The record shows without conflict that plaintiff engages in substantial income-producing activities in California. It has local offices here as well as employees who devote their entire time to soliciting orders, receiving payments, adjusting complaints, collecting delinquent accounts, and performing other services for plaintiff. This state provides a market in which plaintiff operates in competition with local law-book publishers. Plaintiff's agents receive the same protection and other benefits from the state as agents carrying on business activities for a principal engaged in intrastate business. The state protects plaintiff's business transactions within its borders and maintains courts in which plaintiff enforces payment for the sale of its publications."

A DISCUSSION OF THE AUTHORITIES RELIED UPON BY THE PETITIONER

Since it is a fact recognized by all the Courts that prior decisions with reference to the immunity from taxation of foreign corporations are no longer "the beacons marking out a fixed if tortuous channel." as stated by Judge Sibley of the Circuit Court of Appeals, but it is likewise true, as stated by Judge Sibley in the case of Stone v. Interstate Natural Gas Company, supra, that:

"The principal of stare decisis in constitutional interpretations has recently received shattering blows in the

Supreme Court, and especially in the field of immunities from general taxation. The increasing social burdens assumed by our governments, both State and National, will require increasing and more searching taxation for their support. Any immuit from equal general taxation appears more and more inconvenient and unjust. The recent re-examination of the basis for such immunities has resulted in upheaval. The current of authority has been turned. For the judicial navigator the cases are no longer the beacons marking out a fixed if tortuous channel. He must for awhile fix his eyes anew upon the Constitution as the pole star of his firmament and steer his course rather by principle than by precedent."

I shall therefore not consume the time of the Court by making any reference to the cases cited by the attorneys for the petitioner, decided before the date of said decision, since the Court of Mississippi definitely states that it is committed to the "new trend," which is likewise true of all other Courts, including this Court. I shall therefore discuss only the more recent cases cited by the attorneys for the petitioner.

The case of Illinois Natural Gas Company vs. Central Illinois Public Service Company, reported in 314 U. S. 498, was a case involving an order of the Public Service Commission, requiring the appellant to supply another company with natural gas, and to make the necessary pipe line connection. This case therefore involved an attempt at regulation of the manner in which the business of the appellant was conducted. I am unable to see any application of said case to the question involved in the case before this Court, which has nothing whatever to do with any regulation or control over the business of the petitioner.

Another case cited by the attorneys for the petitioner in point of time of decision is the case of Murdock vs. Pennsylvania, 319 U. S. 105. This is one of the so-called "Jehovah's Witnesses" cases. The case involved only the validity of a municipal ordinance requiring the payment of a privilege tax for the privilege of selling religious tracts. And again, I am unable to conceive how said case, or any question decided thereby, would have the remotest application to the case before this Court.

The only recent case that is cited by the attorneys for the

petitioner which approaches the question before this Court, is the case of Freeman vs. Hewit, decided by the Supreme Court of the United States on December 16, 1946, reported in Advance Sheet No. 3 of Volume 91 of the United States Supreme Court decisions. This case involved the right of the State of Indiana to impose a tax upon "the receipt of the entire gross income" of residents and domiciliaries. This fact alone is sufficient to distinguish said case from the case at bar, since the case before this Court has no application to and does not involve any question of the right of the State of Mississippi to impose any tax based upon the business conducted by the appellee. But in the general discussion of the subject by the Court, certain fundamental principles were mentioned which not only serve to distinguish said case from the case at bar, but which support the contention of the respondent in this case as to the right of a sovereign state to demand tribute such as that exacted by the law under consideration as distinguished from the interference with, or control of interstate commerce. The language of the Court applicable to the case at bar being:

> "The power of the State to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and of the constituent States.
>
> "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.
>
> "But in the necessary accommodation between local needs and the overriding requirements of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial.

"To extract a fair tithe from interstate commerce for the local protection afforded it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. American Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522; Utah Power & L. Co. v. Pfost, 286 U. S. 165 76 L. Ed. 1038, 52 S. Ct. 548. It can impose license taxes on domestic and foreign corporations who would do business in the State, Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632, 38 S. Ct. 295; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 364, 59 L. Ed. 265, 272, 35 S. Ct. 99, though it cannot, even under the guise of such excises, 'hamper' interstate commerce. Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 S. Ct. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. Ed. 378, 30 S. Ct. 232 (particularly White, J., concurring at p 63); Henderson, the Position of Foreign Corporations in American Constitutional Law (1918) 118-123, 128-131. It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. United States Glue Co. v. Oak Creek, 247, U. S. 321, 62 L. Ed. 1135, 38 S. Ct. 499, Ann. Cas. 1918E 748; cf. Atlantic Coast Line R. Co. v. Daughton, 262 U. S. 413, 67 L. Ed. 1051, 43 S. Ct. 620.

"These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the cost of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts,

> a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause."

The only other case cited by the attorney for the petitioner, which I deem it necessary to consider only because of the fact that it was decided subsequent to the date on which the modern trend of decisions began, is that of Joseph v. Carter & Weekes Stevedoring Company, decided March 10, 1947, and reported in Advance Sheet No. 9 of Volume 67 of the Supreme Court Reporter at page 815. This case, unlike the case now before the Court, involved a statute which sought to impose a definite percentage of the gross receipts of an activity which was definitely a part of interstate commerce. The Court pointing out that under the "Puget Sound" case that the Courts had held that by reason of the fact that sea-going vessels required skillful loading for the safety of the vessel and the cargo, made the activity of stevedores in loading the vessels an integral part of the interstate commerce.

The Court realized, however, that the tax demanded, and the bas's of such demand in the present case is entirely separate and distinct from the receipts of the business conducted by the petitioner, in that there is no relation to, or reference whatever to the income from the business conducted.

The Legislature of Mississippi in enacting the statute under consideration, as well as the Commissioner, in his construction of the statute as applied to the basis for imposition of the tax involved in this case, considered only one basis for measurement of the tax involved, and that is the assessed value of the tangible property owned in Mississippi in a corporate capacity, which ownership enjoyed the protection of laws and government of the state.

I therefore assert that the case referred to not only has no bearing on the question before this Court, but the following language from said opinion definitely upholds the contention of the respondent that there is no constitutional inhibition nor decision of any Court which would deny the right of the state to impose the tax on the sole basis which the tax in question was demanded:

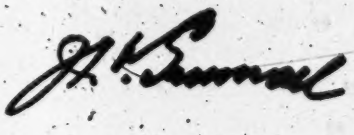
> "It is trite to repeat that the want of power in the confederation to regulate commerce was a principal rea-

son for the adoption of the Constitution. The Commerce Clause bears no limitation of power upon its face, and when the Congress acts under it, interpretation has suggested none, except such as may be prescribed by the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. Ed. 23; United States v. Carolene Products Co., 304 U. S. 144, 147, 58 S. Ct. 778, 780, 781, 82 L. Ed. 1234; North American C. v. Securities and Exchange Commission, 327 U. S. 686, 704, 66 S. Ct. 785, 795, 796. **On the other hand, the Constitution, by words, places no limitation upon a state's power to tax the things or activities or persons within its boundaries."**

CONCLUSION

I therefore respectfully submit that the judgment of the Supreme Court of Mississippi was eminently correct. Said Court having construed the law involved, as applied to the facts in the case, which limited the imposition of the tax to the alternative provided by statute of demanding tribute only on the basis of the protection received, measured by the value of property as submitted by the owner for the purpose of ad valorem taxes; and the amount of the taxes demanded having no relation to nor measured by the volume of interstate business transacted through its facilities, said tax could not be regarded as applying to, interfering with, nor regulating interstate commerce.

I further submit that said case should be affirmed by this Court.



RESPECTFULLY SUBMITTED:
J. H. Sumrall
Attorney for the Respondent

CERTIFICATE

I, J. H. Sumrall, Attorney of Record for the respondent in the foregoing styled and numbered cause, do hereby certify that I have on this date mailed to the proper post office address, with sufficient postage attached thereto, true copies of this brief to Hon. Bernard L. Tighe, Attorney, of Jackson, Mississippi, and Hon. E. P. Russell, Attorney, of Memphis,

Tennessee, the Attorneys of Record for the petitioner herein.

This 5th day of November, A. D., 1947.

Attorney for the Respondent

SUPREME COURT OF THE UNITED STATES

No. 94.—October Term, 1947.

Memphis Natural Gas Company, Petitioner, v. A. H. Stone, Chairman, State Tax Commission of Mississippi. | On Writ of Certiorari to the Supreme Court of the State of Mississippi.

[June 21, 1948.]

Mr. Justice Reed announced the judgment of the Court and an opinion in which Mr. Justice Douglas and Mr. Justice Murphy join.

The Memphis Natural Gas Company is a Delaware corporation which owns and operates a pipe line for the transportation of natural gas. The line runs from the Monroe Gas Field in the State of Louisiana through the states of Arkansas and Mississippi to Memphis and other points in the State of Tennessee. Approximately 135 miles of the pipe line lie within Mississippi; at two points within that state there are compressing stations. It is stipulated that the Gas Company has never engaged in any intrastate commerce in Mississippi; that it has only one customer within the state, the Mississippi Power and Light Company, to which it sells gas from its interstate line at wholesale from several delivery points; that the Gas Company has never qualified under the laws of Mississippi to do intrastate business within that state; that it has no agent for the service of process and that it has no office within the state; and that its only employees and representatives in Mississippi are those necessary to maintain the pipe line and its auxiliary appurtenances.

The Gas Company has paid all ad valorem taxes assessed against its property in Mississippi pursuant to the state law. In addition to the ad valorem taxes, Missis-

sippi imposes a "franchise or excise tax" upon all corporations "doing business" within the state.[1] For the purpose of the Act, "doing business" is defined "[to] mean and [to] include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization."[2] The tax is "equal to $1.50 for each $1,000.00 or fraction thereof, of the value of capital used, invested or employed" within the state.

The Gas Company filed a petition for review by the State Tax Commission of Mississippi of the franchise tax

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[1] Miss. Code § 9313 (1942): "There is hereby imposed . . . a franchise or excise tax upon every corporation . . . now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to $1.50 for each $1,000.00 or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the state of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence."

§ 9314: "For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

[2] Miss. Code § 9312 (1942).

assessed against it for the years 1942, 1943 and 1944 by the State Tax Commissioner. In this petition the Gas Company argued that the imposition of the tax by the state was an act prohibited by the Commerce Clause of the Federal Constitution. From an order of the Tax Commission approving the action of the Commissioner, the Gas Company appealed to the Circuit Court of Hinds County, Mississippi. That court reversed the Tax Commission, but was itself reversed by the Supreme Court of Mississippi. The Supreme Court said that Mississippi had made "no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." 201 Miss. —, —. It argued that the state tax did not bear directly upon interstate commerce and that any burden imposed upon that commerce was remote and unsubstantial. It concluded that the local tax was not unconstitutional and ordered that the taxes in question, plus penalties, be paid by the Gas Company. A petition for certiorari, under § 237 (b), Judicial Code, was filed in this Court by the Gas Company on May 17, 1947. It presented the question as to whether the judgment violated the Commerce Clause by requiring a foreign undomesticated corporation, engaged in interstate commerce, to pay the tax. That petition was granted June 16, 1947. 331 U. S. 802.

The suggestion is made that by the stipulation of facts in the trial court, Mississippi concedes the truth of an

allegation of the challenged petition before the State Tax Commission reading as follows:

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession and possession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving it of such right, unless congress should see fit to interpose some contrary regulation. Your Petitioner obtains no protection from the State of Mississippi and acquires no powers or privileges in its interstate activity other than the protection afforded your Petitioner by virtue of the payment of an ad valorem tax on the property used by the Company wholly in interstate commerce."

It is said that because of this concession Mississippi cannot exact a tax from petitioner as the state "affords nothing to this petitioner for which it could ask recompense by way of a tax." The pertinent part of the stipulation reads: "That all of the facts stated in said petition are true and no proof of the same shall be required in this cause." No contention as to the concession is presented to us by the petition for certiorari, assignment of errors or brief. Petitioner's contention is that the tax levied against it is invalid under the Commerce Clause. Petitioner's failure to raise the question alone would justify a refusal here to consider the contention. See *Connecticut R. Co.* v. *Palmer*, 305 U. S. 493, 496; *Kessler* v. *Strecker*, 307 U. S. 22, 34. The answer to the suggestion, however, seems to us clear. The argument is that the Supreme Court of Mississippi must be reversed because the tax before us "is a tax on the privilege of engaging in the

doing of interstate business within the State, and such a tax is . . . invalid under the Commerce Clause." This conclusion seems to be reached by the following analysis. The stipulation between the Company and the State Tax Commission is read as if the phrase "in its interstate activity" modified only the words "powers" and "privileges" and not the word "protection." If that is a proper construction of this stipulation, then the parties have agreed that the Company has obtained by the tax "no protection from the State . . . other than the protection afforded . . . by virtue of the payment of an ad valorem tax . . . ." The dissent then concludes that the imposition of the ad valorem taxes "exhausted" the state's taxing power and, consequently, that the tax "is a tax on the privilege of engaging in interstate business" and, as such, "invalid under the Commerce Clause."

The state Supreme Court construed the tax as "an exaction . . . as a recompense for . . . protection of . . . the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." As we are bound by the construction of the state statute by the state court, it is idle to suggest that the tax is on "the privilege of engaging in interstate business." Nor can this result be changed by the suggestion that the tax cannot be on any local incidents "because they have already been fully taxed." The local incidents, spoken of by the Supreme Court of Mississippi, were not the taxable events selected for the imposition of the ad valorem tax. These local incidents were the basis for the franchise or excise tax now in controversy. No reason is perceived why Mississippi cannot exact this different tax for the same protection. It is as though the ad valorem rate had been increased. The power to levy such a new tax is not and could not be questioned except as an interference with commerce.

The legal question remains as to whether a state can exact a tax on those activities under the Commerce Clause.

The facts of this case present again the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities admittedly necessary to maintain or operate the interstate business of the taxpayer. This transportation by pipe line with deliveries within the state at wholesale only is interstate business. *Panhandle Eastern Pipe Line Co.* v. *Comm'n*, 332 U. S. 507, 513, and cases cited. Notwithstanding the power granted to Congress by the Commerce Clause to regulate the taxation of interstate commerce, if it so desires,[3] that body generally has left the determination to the courts of what state taxes on or affecting commerce were permissible and what impermissible under the Commerce Clause. The states have sought by taxation to collect from the instrumentalities of commerce compensation for the protection and advantages rendered to commerce by state governments. The federal courts have sought over the years to determine the scope of a state's power to tax in the light of the competing interests of interstate commerce, and of the states, with their power to impose reasonable taxes upon incidents connected with that commerce. See *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 441. We continue at that task, characterized long ago as an area of "nice distinctions." *Galveston, Harrisburg & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 225.

There is no question here of Due Process. The Gas Company's property is in the taxing state where the taxable incidents occurred. *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 329. See *Nippert* v. *City of Richmond*, 327

[3] *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429.

U. S. 416, 423. Nor is the measure used to calculate the amount of the tax challenged. That measure is $1.50 on each thousand dollars of capital employed within Mississippi. *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, 156, Third. The attack on the Mississippi statute is that it violates the Commerce Clause by putting a tax on the commerce itself.

The local incidents covered by the definition of doing business hereinbefore set out, § 9312, Mississippi Code, *supra*, were said by the Supreme Court in this case to be "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system" in Mississippi. 201 Miss. —, —.[4] The cases just cited in

[4] Such local incidents form a sound basis for taxation by a state of foreign corporations doing interstate business. For example, we have upheld state taxes on sales after completion of the interstate transit, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; on production of electricity for interstate commerce, *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, compare *Fisher's Blend Station, Inc.*, v. *Tax Comm'n*, 297 U. S. 650, 655; a privilege tax on the operation of machines for the production of electricity to drive gas in interstate commerce, *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604; a use tax on rails shipped interstate for immediate incorporation into an interstate transportation system, *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167.

We have upheld a franchise tax on a foreign corporation authorized to do business and making sales in a state other than its actual or business domicile, *Ford* v. *Beauchamp*, 308 U. S. 331; a privilege tax on a foreign corporation doing business in the state upon a proportion of property in the taxing state that was computed by using interstate commerce as an element, *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511; an excise on intrastate manufacturing, added to an ad valorem tax and measured by sales, including out of state, *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, and see Powell, 60 Harv. L. Rev. 508 and 727, *Freeman* v. *Hewit*, 329 U. S. 249, 255; a license for storing goods at rest in the state under a transit privilege, *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70.

the note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself.[5] But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. *Nippert* v. *City of Richmond, supra,* at 423. The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce.[6] Again, where there is a state exaction for some intrastate privilege that discriminates against interstate commerce, it is invalid even though it is sufficiently disconnected from the commerce to be taxable otherwise.[7]

The Mississippi tax under consideration is not discriminatory. It is levied, in addition to ad valorem taxes, on corporations created under Mississippi laws, those admitted to do business in Mississippi and those operating in the state without any authority from the state. See note 1, *supra.* Petitioner operated local compressor stations. We have heretofore held that the generation of electric energy for the operation of such stations was subject to state taxation without violation of the Commerce Clause. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U. S. 604. A glance at the activities, named above, listed by the Supreme Court of Mississippi, shows that there is

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[5] See *Western Live Stock* v. *Bureau,* 303 U. S. 250, 254.

[6] See *Western Live Stock* v. *Bureau,* 303 U. S. 250, 255.

[7] See *Best & Co.* v. *Maxwell,* 311 U. S. 454; *Nippert* v. *City of Richmond, supra,* at 431–32. Cf. *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495, 501–502.

no possibility of multiple taxation through the same exactions by other states. The amount of the tax is reasonable.[8] It is properly apportioned to the investment in Mississippi.[9]

However, a state tax upon a corporation doing only an interstate business may be invalid under our decisions because levied (1) upon the privilege of doing interstate business within the state,[10] or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself.[11] Petitioner asserts that the Mississippi statute so offends.

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[8] See *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, 295, and *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, 514.

[9] See *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, 156, Third, and cases cited; *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 422–23; *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495, 501–502.

[10] This Court has held many times that a state has no power to refuse or tax the privilege of doing interstate business. A foreign corporation, seeking or requiring no privilege from a state such as the power of eminent domain, the right to use public ways or beds of streams, and without federal charter or other federal statutory privilege, cannot be denied the right to enter a state, remain there and operate a purely interstate business without a state franchise. *Crutcher* v. *Kentucky*, 141 U. S. 47, 56; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107 (3); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. See also *California* v. *Pacific R. Co.*, 127 U. S. 1; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *Colorado* v. *United States*, 271 U. S. 153, 164; *State ex rel. Board* v. *Stanolind Pipe Line Co.*, 216 Iowa 436, 445.

[11] *Freeman* v. *Hewit*, 329 U. S. 249, "because it taxes the very process of interstate commerce" (p. 253), it is "a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause" (p. 256); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax . . . upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid" (p. 433); this follows, "a line of

First. This Court has drawn the distinction in the field of pipe line taxation between state statutes on the privilege of doing business where only interstate business was done and those upon appropriate local incidents. In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, the Ozark Pipe Line Corporation operated an oil pipe line from Oklahoma, through Missouri to a point in Illinois. Oil was neither received nor delivered in Missouri. This was interstate transportation. *Interstate Natural Gas Co.* v. *Power Comm'n*, 331 U. S. 682, 689, and cases cited at note 12. It had its principal office in Missouri. It had a license from Missouri authorizing it to engage "'exclusively in the business of transporting crude petroleum by pipe line.'" Page 561. The state tax was an apportioned franchise tax.[12] It was construed by this Court as a tax "upon the privilege or right to do business." Page 562. *Virginia* v. *Imperial Coal Co.*, 293 U. S. 15, 20. As such a tax upon a corporation doing only an interstate business, it was held invalid under the Commerce Clause.[13]

In *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, a pipe line ran from Louisiana, through

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precedents outlawing taxes on the commerce itself" (p. 433). *Galveston, Harrisburg & S. A. R. Co.* v. *Texas*, *supra* at 224.

See *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 312, n. 11; see comments on *American Mfg. Co.* v. *St. Louis*, n. 4, *supra*.

[12] Mo. Rev. Stat. § 9836 (1919):

". . . Every corporation, not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the state of Missouri equal to one-tenth of one per cent. of the par value of its capital stock and surplus employed in business in this state . . . ."

[13] The opinion evoked a dissent by Justice Brandeis which pointed out that: "The tax assailed is not laid upon the occupation . . ."; nor "upon the privilege of doing business." Pp. 567–68. The Justice concluded that "a tax is not a direct burden merely because

Mississippi and back to Louisiana. Two local Mississippi distributors took gas in that state from the respondent. Mississippi sought to tax the respondent under a privilege tax law that required the pipe line company to get a license to exercise the privilege desired that

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it is laid upon an indispensable instrumentality of such commerce," but that the contrary is true "where it is upon property moving in interstate commerce." P. 569. Compare *Ozark* with *Atlantic Lumber Co.* v. *Comm'r*, 298 U. S. 553.

The *Ozark* case has had a long history in this Court. Since 288 U. S., it has not been cited in a manner pertinent to our present issue, except to be distinguished, sometimes narrowly. In *Helson* v. *Kentucky*, 279 U. S. 245, 249, and *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 43, it was cited with approval for the proposition that a state cannot lay a tax on the occupation or the business of carrying on interstate commerce. In *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, *Ozark* was relied upon to hold unconstitutional a state tax upon a corporation which was qualified to do intrastate business within the state but which in fact did only an interstate business. Cardozo, J., joined by Brandeis, J., and Stone, J., dissented on the ground that the tax could be supported as a tax laid upon the privilege to do intrastate business. *Ozark* was next before the Court in *Virginia* v. *Imperial Coal Co.*, *supra*, a case involving a tax on tangible and intangible property situated and used within the state to carry on an exclusively interstate business. In that case it was distinguished on the ground that an ad valorem property tax, and not a privilege tax, was before the Court. In *Atlantic Lumber Co.* v. *Comm'r*, 298 U. S. 553, involving an excise tax on corporations doing business within Massachusetts, *Ozark* was again distinguished, this time on the ground that the Lumber Co. was engaged in local activities within the state and, therefore, that the burden imposed upon its interstate commerce was remote and incidental. Again, in *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, *Ozark* was found to be inapposite because of factual differences. *Southern Gas* ruled upon the constitutionality of a tax assessed on the basis of the same tax that was before this Court in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, *supra*. The state tax was held constitutional by the *Southern Gas* case as a tax exacted for the privilege of doing an intrastate business by a company in fact engaging in intrastate business in Alabama.

is, to operate an interstate pipe line.[14] This Court held that the entire business of the respondent was interstate despite a claimed local activity by the reduction of pressure to deliver gas to the Mississippi distributors. It followed that the state license for the privilege of engaging in the business of operating a pipe line was an invalid burden under the Commerce Clause.[15]

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[14] Miss. Gen. Laws (1930), ch. 88, § 3: "Every person desiring to engage in any business, or exercise any privilege hereinafter specified, shall first, before commencing same, apply for, pay for, and procure from the proper officer a privilege license authorizing him to engage in the business, or exercise the privilege specified therein; and the amount of tax shown in the following schedules is hereby imposed for the privilege of engaging and/or continuing in the businesses set out therein."

Id., § 163: "Upon each person engaging and/or continuing in this state in the business of operating a pipe line or transporting in or through this state oil, or natural, or artificial gas, through pipes, and/or conduits, a tax, as follows: [On each mile a varying tax that depended upon the diameter of the pipe]."

[15] The same rationale has led this Court at times to declare invalid similar taxes on foreign corporations, admitted to do business in a state and doing only an interstate business through activities within the state. The leading decisions supporting this view (*Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, and *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203) have been strictly limited. *Atlantic Lumber Co.* v. *Commissioner*, 298 U. S. 553; cf. *Southern Gas Corporation* v. *Alabama*, *supra*, at p. 156, and dissent in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, 229, at 237. In the *Cheney* case an excise tax for the privilege of doing business in Massachusetts of an unapportioned percentage of its authorized capital stock (Mass. Acts, 1909, c. 490, Part III, § 56) was invalidated as being wholly on interstate commerce although it maintained "in Boston a selling office with one office salesman and four other salesmen who travel through New England. The salesmen solicit and take orders, subject to approval by the home office in Connecticut, and it ships directly to the purchasers. No stock of goods is kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders are retained, but no bookkeeping is done, and the office makes no collections. The

On the other hand, in *Interstate Natural Gas Co.* v. *Stone*, 308 U. S. 522, we affirmed *per curiam* a judgment of the Fifth Circuit in *Stone* v. *Interstate Natural Gas Co.*, 103 F. 2d 544, on the authority of *Southern Gas Corporation* v. *Alabama, supra* at 153, 156–57. The tax in question in the 308 U. S. case was exacted by the same Mississippi statute employed here. This differs from the Mississippi statute in the *Interstate* case in 284 U. S. The *Interstate* case in 308 U. S. differed from this present case, so far as is material, only in the fact that the foreign corporation filed a copy of its charter as a prerequisite to doing business in Mississippi and appointed an agent for the service of process. The page references in the *Stone* citation of the *Southern Gas* case show that this Court considered the Mississippi tax in the *Stone* case as one not on business but " 'on the privilege of exercising corporate functions within the State and its employment of its capital in [Mississippi].' " *Southern Gas Corp.* v. *Alabama, supra,* 153. In the *Southern Gas* case, page 155, the company did intrastate business but in the *Stone* case, no intrastate business was done. Thus the local event of qualifying for intrastate business, which occurred in both *Southern Gas* and *Stone*, brought a different result from that in the *Ozark* case and in *Interstate*, 284 U. S., where the privilege or right to do interstate business was protected. Mississippi, through its Supreme Court, has declared that there is no attempt to tax the privilege of doing an interstate

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salesmen and the office rent are paid directly from Connecticut and the other expenses of the office are paid from a small deposit kept in Boston for the purpose. No other business is done in the State." P. 153.

In the *Alpha Portland* case where, on the assumption that the taxpayer had obtained a right to do business in the state, under similar circumstances an unapportioned excise on the privilege to do business in Massachusetts was invalidated because a burden on commerce.

business or to secure anything from the corporation by this statute except compensation for the protection of the enumerated local activities of "maintaining, keeping in repair and otherwise in manning the facilities." 201 Miss. ——. Under § 9314, quoted in note 1, in the light of that statute's definition of "doing business" set out on page 2 *supra*, this is a reasonable meaning to give the taxing statute. We must accept the state court's interpretation.[16] We therefore conclude that the Mississippi statute here involved is not upon the privilege of doing an interstate business.

Second. We come now to the second question. That is whether the challenged excise for carrying on within the state the aforementioned activities of maintenance, repair and manning by a corporation engaged solely in interstate commerce may be taxed. The answer on this point depends upon whether these activities are so much a part of the interstate business as to be under the protection of the Commerce Clause as this Court has construed it.[17] In this case the local activities are those involved in the maintenance of the pipe line. This tax is not an unapportioned tax on gross receipts from the commerce itself. It is measured by a proportion of the capital employed within the state. It cannot be duplicated in other states. Compare *Western Live Stock* v. *Bureau*, 303 U. S. 250, 255. In *Ozark Pipe Line* v. *Monier*, *supra* this Court, at p. 565, spoke of such activities as set out below,[18] "If

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[16] *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Southern Gas Corp.* v. *Alabama*, *supra* at 153, First; *Skiriotes* v. *Florida*, 313 U. S. 69, 79; *Caldarola* v. *Eckert*, 332 U. S. 155, 158.

[17] See note 11, *supra*.

[18] This Court said, 266 U. S. at 565: "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and

it was intended to say that such in-the-state activities as there described could not be taxed, we disagree with that conclusion. We are inclined to the view that the fact that the tax there under consideration was considered a tax "upon the privilege or right to do business," led the Court to point out that as the local activities were essential to that business, they were not taxable activities. The pipe line itself and all appurtenances are essential, yet an ad valorem tax can be laid.[19]

In taxation, we do not have the problems raised by many decisions on state regulations alleged to impede the free flow of commerce when not nationally uniform. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761. Regulations may be imposed by the state on commerce. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, *supra*; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.

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automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business." See also *Heyman* v. *Hays*, 236 U. S. 178, 185.

[19] *Cleveland C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439, 445:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

See also *Northwest Airlines* v. *Minnesota*, 322 U. S. 292; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

When state taxation of activities or property within a state is involved, different considerations control. It is no longer a question of actual interruption of the operation of commerce. *Kelly* v. *Washington*, 302 U. S. 1, 14. Rather a prohibited tax exaction is one beyond the power of the state because the taxable event is outside its boundaries, *McLeod* v. *Dilworth Co.*, *supra*, or for a privilege the state cannot grant. See note 10, *supra*. Is it bad because a tax on the commerce itself? We have sustained a fee for the privilege of using state courts, exacted by the state from a business licensed by the United State to handle customs charges. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202.[20] Likewise a special privilege tax upon an interstate automobile transportation company for the use of the state roads has been approved. *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495.

The Mississippi excise has no more effect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be

[20] In the *Union Brokerage* case we dealt not with an annual tax on franchises or licenses but with a state's single exaction from a foreign corporation for the right to use the courts of the state. The company was a customhouse broker engaged wholly in thus earning fees "'charges upon the commerce itself,'" p. 209. There were incidental activities in the state in furtherance of this main purpose, p. 208: "Union's business is localized in Minnesota, it buys materials and services from people in that State, it enters into business relationships, as this case, a suit against its former president, illustrates, wholly outside of the arrangements it makes with importers or exporters."

conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment.



SUPREME COURT OF THE UNITED STATES

No. 94.—October Term, 1947.

Memphis Natural Gas Company, Petitioner, v. A. H. Stone, Chairman, State Tax Commission of Mississippi.	On Writ of Certiorari to the Supreme Court of the State of Mississippi.

[June 21, 1948.]

Mr. Justice Rutledge, concurring.

In accordance with views which I have heretofore expressed,[1] it is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or "jurisdiction to tax" in that sense is concerned;[2] it is nondiscriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character;[3] is duly apportioned, that is, does not undertake to tax any interstate activities carried on outside the state's borders;[4] and cannot be repeated by any other state.[5]

[1] See *McLeod* v. *Dilworth Co.*, 322 U. S. 327; *General Trading Co.* v. *Tax Comm'n, id.* 335; *Harvester Co.* v. *Dept. of Treasury, id.* 340, separate opinion, *id.* 349; *Freeman* v. *Hewit*, 329 U. S. 249, concurring opinion at 259.

[2] See 322 U. S. at 352, 353; *Nippert* v. *Richmond*, 327 U. S. 416, 423, 424.

[3] See Miss. Code § 9313 (1942), imposing a comparable tax, of identical amount, upon companies organized under Mississippi laws. Intrastate business done in the state obviously would be subject to one tax or the other, depending on whether the company doing it were organized under the state's laws or those of another state.

[4] The statute, Miss. Code §§ 9313 and 9314 (1942), expressly measures and limits the tax by an amount "equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed *within this state* . . ." (Emphasis added.)

[5] Cf. note 4. Apportionment in itself prevents taxation of extrastate "events" or portions of the business done, unless the apportion-

In this view the tax is not different in any substantial respect, for purposes of the commerce clause's prohibitive application, from the apportioned tax upon gross receipts from interstate transportation levied by New York and sustained by the decision recently rendered in *Central Greyhound* v. *Mealey*, 334 U. S. —.[6] That tax is nonetheless one upon the commerce, although it is apportioned. The apportionment, however, guards it from the vice of taxing commerce done in other states and thus also from multiplication by them.[7] In my view the same consequence follows here, in practical effect, both for the bearing of the tax and for saving its validity.

It may be that for the purposes of this case there is little more than a verbal difference in so regarding the tax and in looking at it as one not "upon" the commerce, although affecting it, but as being laid upon "incidents of the commerce" or "taxable events" taking place in Mississippi which are regarded as being "sufficiently separate from" the commerce, whether by reason of the apportionment or otherwise, to sustain the tax. To the

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ment is itself constitutionally invalid as not reflecting a sufficient approximation to what the state may be entitled, on the facts, to tax. Cf. Stone, C. J., dissenting in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 315–316, and authorities cited.

[6] It is, of course, for New York to say whether its tax will be applied upon the apportioned basis permitted by the Court's opinion. There would seem to be little doubt that such an application will be made, in view of the state's alternative argument here for sustaining the tax to that extent in the event its unapportioned application should be found invalid.

[7] See *Freeman* v. *Hewit*, 329 U. S. 249, 266 (concurring opinion) and authorities cited.

That the apportionment in the one case is made in relation to mileage and in the other to the value of capital "used, invested or employed within this state" is of no significance, since the states have considerable latitude in the selection of fair methods of making apportionment. Cf. note 5.

extent that no greater difference is presently involved, I accept the Court's conclusions and its reasoning.

But the difference conceivably may be of large, indeed of controlling, importance for other cases. And, so far as this may be true, I am unable to revert to rationalizations which make merely verbal formulae without reflection of differences in substantive effects controlling in these matters.

The New York legs of the journey involved in the *Central Greyhound* case, *supra*, are interstate commerce, as much as those in New Jersey and Pennsylvania. They do not lose that character merely because an apportioned tax may be levied upon the gross receipts from them. The incidence of that tax is flatly on the commerce, though only on the local portion of it. So here I do not think that the local activities for the protection of which the Mississippi tax purports in terms to be laid become separate from the interstate business which petitioner conducts in Mississippi, either by reason of the apportionment or otherwise. But they are incidents of carrying on that business taking place in Mississippi and only there, for which Mississippi affords protection received from no other state or the United States. Nor can any other state give that protection. For that portion of the business and the protection given it, I think the state is entitled to levy such a tax as has been placed here. Nothing in the commerce clause or its great purposes forbids such an exaction. Nor is the state limited to a single exaction for different or indeed like protections afforded, so long as each is safeguarded against prohibited effects upon commerce, as are those laid by Mississippi, and their aggregate cannot be shown to contravene the clause's purpose.

Accordingly, I concur in the Court's judgment.

SUPREME COURT OF THE UNITED STATES

No. 94.—October Term, 1947.

Memphis Natural Gas Company, Petitioner, v. A. H. Stone, Chairman, State Tax Commission of Mississippi. } On Writ of Certiorari to the Supreme Court of the State of Mississippi.

[June 21, 1948.]

Mr. Justice Frankfurter, with whom The Chief Justice, Mr. Justice Jackson, and Mr. Justice Burton concur, dissenting.

This litigation began before the State Tax Commission of Mississippi by a petition of the Memphis Natural Gas Company for a revision of the franchise tax assessed against that Company under the Franchise Tax Law of Mississippi. On judicial review of this administrative denial, the parties stipulated that "all of the facts stated in said petition are true and no proof of the same shall be required in this cause." [1] The decision therefore must be based on the undisputed allegations of the petition.

Petitioner, a Delaware corporation, owns and operates a pipeline for the transportation of natural gas running from the gas fields in Louisiana through Arkansas and Mississippi into Tennessee. Petitioner has conducted no intrastate business within Mississippi, nor is it qualified to do so. The Company paid Mississippi an income tax "upon that part of its net income fairly attributable to

[1] The second paragraph of the stipulation, in full, is as follows: "That all of the facts stated in said petition are true and no proof of the same shall be required in this cause. The Stipulation that the facts are true shall be limited to the facts stated in the petition and the defendants shall not, by virtue of this Stipulation, be considered or held to have agreed with any of the legal propositions and arguments made by the Memphis Natural Gas Company in said petition as the parties recognize that these legal questions and arguments are for determination by the Court."

activities in Mississippi." It also pays *ad valorem* taxes to the six counties through which the Mississippi portion of its interstate pipeline—some 135 miles—runs. The counties are: Washington, Bolivar, Sunflower, Coahoma, Tunica, and Desoto. It also pays *ad valorem* property taxes to the cities of Greenville (Washington), Indianola (Sunflower), and Clarksdale (Coahoma). In addition to these income and local *ad valorem* property taxes, not here questioned, the State Tax Commission assessed the franchise tax in controversy. This was done under an enactment of 1940, which imposed on all foreign corporations "doing business within this State" [2] a "franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of capital used, invested or employed within this State. . . ." Ch. 115 of the 1940 General Laws of Mississippi § 2; Miss. Code § 9314 (1942). The record is barren of any indication that "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state," *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, other than those for which the State, through its subordinate taxing authorities, has already made exaction, as contrasted with those which are given not by the State but by the United States and for which the State may not make exaction. *Crutcher* v. *Kentucky*, 141 U. S. 47. The record not only makes no such affirmative showing; it denies the foundation for suggesting that the State has given something for which it can exact a return. For it was stipulated between the Company and the State Tax Commission that

> "Your Petitioner obtains no protection from the State of Mississippi and acquires no powers or privileges

[2] The statute defined "doing business" to "mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust." Miss. Code § 9312 (1942).

in its interstate activity other than the protection afforded your Petitioner by virtue of the payment of an ad valorem tax on the property used by the Company wholly in interstate commerce." [3]

Even assuming therefore that, while Mississippi cannot impose a tax for the privilege of doing an exclusively interstate business within the State, it can cast an *ad valorem* property tax on the Mississippi portion of the corpus of its interstate property in a form having all the earmarks of a franchise tax, the assessment here challenged on the record before us cannot stand. And for a very simple reason.

There would hardly be disagreement, I take it, that Alabama could not constitutionally impose an *ad valorem* tax on these 135 miles of pipeline in Mississippi. This is so not because the pipeline does not traverse Alabama—concededly the assailed tax cannot be sustained merely because the pipeline travels through Mississippi—but because Alabama affords nothing to this petitioner for which it could ask recompense by way of a tax. We cannot know, unless we are instructed, how governmental powers are distributed in Mississippi as between its State and local governments. And the petitioner has no proof of its allegations that the nine county and city taxing authorities to which the petitioner pays approximately $85,000 a year in *ad valorem* taxes supply all the benefits which it enjoys from the State and that the State in seeking to enforce the franchise tax against the petitioner

[3] Particularly in the light of the substantial taxes paid by the petitioner for such protection to the nine county and city taxing authorities, where nothing else appears in the record except the exaction, this uncontroverted allegation must control over the presumptive inference that might otherwise be drawn in favor of the validity of the State's exaction. This Court, as the special guardian of the Commerce Clause, ought not to indulge in casuistic assumptions that the allegations left uncontroverted by the State do not correspond to the realities of the Mississippi situation.

is asking something (approximately $3,500 a year) for nothing. But "no proof of the same shall be required in this cause," according to the stipulation between the parties, to which the State Tax Commission has set its name. See *H. Hackfeld & Co.* v. *United States*, 197 U. S. 442, 446. In holding that Mississippi is "exacting compensation under this statute for the protection it affords the activities within its borders" to this petitioner the Court is flying in the face of the record. On the basis of that record Mississippi can no more exact this tax against this pipeline than could Alabama. For we are all agreed that where the only "local incident" is the fact of interstate commerce—that the interstate pipeline goes through Mississippi—the tax is necessarily a tax upon the privilege of doing interstate business. The Commerce Clause put an end to the power of the States to charge for that privilege.

But it is suggested that we are barred from reaching this conclusion, though the record compels it, because it deals with an issue not before us. Let us see. The petition for certiorari presented this question:

> "Admittedly petitioner is engaged in Mississippi solely in interstate commerce. It pays to Mississippi *ad valorem* and income taxes and thus contributes materially to the cost of local government. An undomesticated foreign corporation has the right to engage in Mississippi in interstate commerce without paying for the privilege as the privilege flows from the Commerce Clause of the Federal Constitution and may not be directly burdened by the imposition of a local 'franchise or excise tax.'"

By this statement the petitioner clearly asserted that insofar as Mississippi has power to tax this interstate business for the protection accorded the "local incidents" of that business, the taxes levied by the State through its

local taxing authorities exhausted the power. To tax beyond that is a bald tax on the privilege of doing interstate commerce. If we were precluded from deciding a case only by the precise course of argument presented by counsel, many of our opinions would have to be deleted from the United States Reports.

The Court however attempts to deal with the contention. As I understand the Court's opinion, it argues that even if it be true that this tax does not recompense the State for the local protection accorded the petitioner's activities, this is wholly immaterial as the Supreme Court of Mississippi has given the *tax* a contrary interpretation. The opinion offers the extraordinary suggestion that although the State Tax Commission on behalf of the State conceded that the exaction as a matter of fact afforded no protection, the State Supreme Court may disregard such a concession of fact, having all the force of proof, and hold as a matter of law that protection beyond that for which taxes were already imposed was enjoyed by the interstate business.

In the first place the Supreme Court of Mississippi purported to do no such thing. On the contrary, its opinion concluded as follows:

> "Does the franchise tax here demanded amount to enough to have any substantial effect to block or impede the free flow of commerce, or is it at all out of reasonable proportion to the services and protection which must be furnished by the State in and about the stated local activities? The franchise tax demanded is approximately $3,400 per annum, whereas the ad valorem taxes are approximately $82,000 a year, whence the obvious answer to this last question must be in the negative." (— Miss. —.)

Of course, a State tax on interstate commerce does not become a valid one merely because "it's only a little one." And even in these days, an unconstitutional exaction by a State of $3,400 is not *de minimis*.

But even if the State court's opinion were susceptible of the construction accorded it by this Court, its *ipse dixit* in applying the Commerce Clause, would not be binding on this Court. Of course the construction of a statute is for the State court. But the construction of the statute which this Court now attributes to the State Supreme Court, whereby the tax is imposed not for any "local incidents"—because these have already been fully taxed—makes clear beyond peradventure that it is a tax on the privilege of engaging in the doing of interstate business within the State, and such a tax is, of course, invalid under the Commerce Clause.

It is a novel abdication of this Court's function that we are bound by a State court's views of the constitutional significance of a State tax on interstate business, but are not bound by an unambiguous stipulation by the State that no protection was afforded by the State to the taxable local incidents of the interstate business beyond that for which the State, through its local agencies, has already levied the tax.

A State may of course increase the rate of a properly apportioned ad valorem tax of an interstate business. Compare *Wallace* v. *Hines*, 253 U. S. 66. But it can do so only by increasing the rate. The mere fact that the same number of dollars could have been exacted by the State in a constitutional way cannot legalize every tax, "as though the ad valorem rate had been increased." Because a State could obtain twice the amount of revenue that it gets from an interstate business by increasing the ad valorem rate does not constitutionally justify a tax which, by virtue of a stipulation having the force of

truth, is not referable to any protection which the State accords.

These are not abstract objections against disregarding the tax which the State has in fact levied and treating it as though it levied some other tax. Practical considerations preclude such a patent endeavor to circumvent the restrictions that the Commerce Clause places upon the taxing powers of the States. A State legislature may be ready to levy a tax for the privilege of doing interstate business within the State—as legislatures have again and again attempted to do—and not be prepared to increase outright the ad valorem rate.

The suggestion that an otherwise unconstitutional tax may be treated "as though the ad valorem rate had been increased" is an easy way of sustaining almost every tax that would otherwise fall under the ban of the Commerce Clause by transmuting it into an assumed increase in the rate of an ad valorem tax. The suggestion has the merit of inventiveness. In the competition for revenue among the States, it is an inventiveness that subjects the hitherto great boon of free trade across State lines to the bane of multitudinous local tariffs.

The judgment should be reversed.